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No. 93-1674

IN THE

Supreme Court of the United States

OCTOBER TERM 1993

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF THE NEW YORK and JOHN BORDEN,
Petitioners,

- vs. -

SHARON KARIBIAN and MARK URBAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Respondent Sharon Karibian, in her opposing brief in No. 93-1674, seeks to obfuscate a primary issue presented to this Court, which is whether this Court should allow the Court of Appeals for the Second Circuit to disregard this Court's prior directive in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986), that the legal standard for employer liability for sexual harassment is not absolute. As more fully discussed in the Petition for a Writ of Certiorari ("Petition" or "Pet.") filed on behalf of petitioner The Trustees of Columbia University in The City of New York ("Columbia University" or the "University"), this Court should hear this case so that lower courts may continue to consider all relevant factors in determining employer liability, including an employer's policy against sexual harassment and procedures to prevent and promptly remedy such

claims. As this Court previously noted, such policy and procedures are "plainly relevant". *Id.* at 72.

In an apparent effort to distract this Court's attention from the legal issues concerning the standard for employer liability in a "submission" case and the role of an employer's policy and procedures, respondent Karibian seeks to rewrite the "facts" even though her purported factual citations do not survive scrutiny when one looks at the actual record.[1]

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[1] Although respondent's Statement of the Case is replete with incorrect and unsupported statements, no effort is made herein to address all such "facts" inasmuch as factual questions are not at issue before this Court and Columbia University has consistently reserved its rights in this regard. (Pet. at 4, n.1) Nonetheless, three brief examples are illustrative of respondent Karibian's efforts to mask the important legal issues presented by distorting the factual record.

(a) Respondent Karibian would like this Court to believe that Columbia University's response was retaliatory. (Brief In Opposition at 6, 7.) This is simply belied by the undisputed record:

(i) Respondent Karibian admits that after she and all other employees at the Telefund at Columbia University were laid off, she was advised to and did review job postings at the University's Employment Office and chose not to apply for another job at the University (respondent Karibian's deposition, Supplemental Appendix before the Court of Appeals (hereinafter "RS") at RS888-90).

(ii) The District Court held that respondent Karibian "makes a conclusory, totally unsupported allegation that this was in retaliation for her sexual harassment complaint. Columbia has produced conclusive evidence that the Telefund program was canceled for independent business reasons." (Appendix B to the Petition at A23.)

(iii) The Court of Appeals for the Second Circuit concluded that respondent had forfeited, if not abandoned, any retaliatory claim. (Appendix A to the Petition at A7.)

(b) Respondent would like this Court to believe that she told the University's personnel director that "Urban physically abused her, frightened her and forced her to have sex with him." (Brief In Opposition at 5.) Respondent relies on R246 of the record below for this claim. However, if one actually reads R246,

The facts, of course, are not at issue before this Court. Rather, whatever factual scenario is presented to a court, whether in this case or others, the crucial questions presented for determination by this Court concern the legal standard for employer liability for claims of sexual harassment.

It is for this reason that it is important for this Court to grant the petition for a writ of certiorari so that it can determine whether to continue to reject a strict or absolute liability standard in favor of a legal standard that allows lower courts to consider all relevant factors, including the important role of employers' policies and procedures against sexual harassment.

Notwithstanding respondent's claims to the contrary, the Second Circuit's decision in this case does conflict with this Court's prior decision in *Vinson*, and the Second Circuit has created a conflict within the circuits by making employers absolutely liable "regardless of the absence of notice or the reasonableness of [employer's] complaint procedures." (Appendix A to Petition at A14.)[2]

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it is readily apparent this is not supported by that record cite, and no such testimony exists.

(c) Respondent would like this Court to believe that Urban cut her hours and terminated her higher level jobs. (Brief In Opposition at 5.) This is also unsupported by the record below. Moreover, if true, then Karibian would have presented a more typical "refusal case coupled with actual loss of economic benefit" and it would have been unnecessary for the Second Circuit to create a new standard of absolute liability.

As noted above, these examples are presented to demonstrate to this Court that respondent has taken liberties with the fact record in an effort to detract from the important legal issues presented.

[2] Respondent's mischaracterization of case law also does not survive scrutiny. By way of illustration, respondent takes a footnote in *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993), out of context and misconstrues *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987), (Brief In Opposition at 14) in an effort to create the incorrect impression that other courts have utilized

Respondent also misses the point by arguing that no showing of economic loss is required in a *quid pro quo* "submission case". (Brief In Opposition at 10-12.) Rather, where there is no economic loss and therefore no absolute determination of agency responsibility can be made, the issue is whether all relevant factors, including the employer's policy and procedures, should be considered in determining whether liability can attach to the employer. (*See* Petition at 12-13.)

The importance of the legal standard of employer liability, and the roles of employers and employees, in this sensitive area of sexual relationships and sexual harassment claims is more fully discussed in the Petition and the briefs submitted by *amicus curiae* and proposed *amici curiae*. The Second Circuit's conflict with this Court and other Circuits, the important legal issues presented, the impact of those issues on employment and personal relations, and the significance of employment discrimination claims to the business of the federal courts, all warrant consideration of this case by this

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a strict liability standard. One need only read the text prior to such footnote in *Saxton* to understand that the Seventh Circuit reviewed all relevant factors in that case and stated, "But Title VII requires only that the employer take steps reasonably likely to stop the harassment (citations omitted)." *Saxton*, 10 F.3d at 536. Similarly, in *Sparks*, the Eleventh Circuit found that *Vinson* had no bearing on that appeal because that employer had proffered no evidence of a policy or effective grievance procedures. *Sparks*, 830 F.2d at 1560.

Court. Accordingly, it is respectfully submitted that this Court should grant the Petition and issue a Writ of Certiorari to The Court of Appeals for the Second Circuit.

Respectfully submitted,

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